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IN THE

Supreme Court of the United States

OCTOBER TERM, 1975

No. 75-1524

TRUSTEES OF THE READING BODY WORKS, INC.
PROFIT SHARING PLAN TRUST, *Petitioners*

v.

SECURITIES INVESTOR PROTECTION CORPORATION, ET AL.,
Respondent

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Second Circuit

BRIEF IN OPPOSITION OF RESPONDENT SECURITIES INVESTOR PROTECTION CORPORATION

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INDEX

TABLE OF AUTHORITIES

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QUESTIONS PRESENTED

For purposes of a proceeding to liquidate the business of a broker-dealer under the Securities Investor Protection Act of 1970 [1] (the "1970 Act"), the term "customers" of the broker-dealer is carefully defined in section 78fff(c)(2)(A)(ii) [2] which was de-

[1] 15 U.S.C. § 78aaa *et seq.*

[2] All citations to sections of the 1970 Act will be to sections of Title 15 of the United States Code.

rived from section 60e(1) of the Bankruptcy Act.[3] The claim of each customer based on his securities account may be satisfied from the funds of respondent Securities Investor Protection Corporation ("SIPC") to a maximum of $50,000 if the broker-dealer's assets are insufficient to satisfy the claim.

The Petitioners' statement of the first "Question Presented" is imprecise. Respondent SIPC would state that question as follows:

> Whether by its definition of "customers" in the 1970 Act Congress intended to include all employees participating in an employer's profit sharing plan as the separate "customers" of the broker-dealer with respect to a securities account (i) which was opened, maintained and controlled exclusively by the three co-trustees of the trust created under the plan, (ii) over which the employees had no rights or control whatsoever, and (iii) title to the securities or cash in which was vested exclusively in the co-trustees as part of the trust *res*.

The Petitioners' statement of the second question is adequate.

The Petitioners' reference under "Questions Presented" to each employee as one "who maintained an account with the debtor" (Petition at 3) is erroneous and misleading.

JURISDICTION

The Petitioners invoke the jurisdiction of this Court under 28 U.S.C. § 1254(1). However, this being a controversy in bankruptcy the jurisdiction of this

[3] 11 U.S.C. § 96e(1).

Court is also primarily derived from 11 U.S.C. § 47(c).[4]

STATUTES INVOLVED

In addition to the basic definition of "customers" included in the Petitioners' Appendix, Section 78fff (c)(2)(A)(iii) of the 1970 Act provides:

> "'cash customer' means, with respect to any securities or cash, customers entitled to immediate possession of such securities or cash without the payment of any sum to the debtor, and for purposes of this clause, the same person may be a cash customer with reference to certain securities or cash and not a cash customer with reference to other securities or cash;"

The Petitioners' account owed no sum to this debtor.

STATEMENT OF THE CASE

This case arises in a proceeding for the liquidation of Morgan, Kennedy & Co., Inc. ("Debtor") under the 1970 Act. The Petitioners are the three Trustees of the Trust created under the Profit Sharing Plan ("Plan") established by Reading Body Works, Inc. ("Reading") for its employees ("Reading Employees"). The respondents are SIPC which

[4] See Mitchell Store Building Co. v. Carroll, 232 U.S. 379 (1914). A liquidation proceeding under the 1970 Act is substantially governed by provisions of the Bankruptcy Act except to the extent they are inconsistent with the 1970 Act. See 78fff(c)(1). Insofar as it provides for liquidation proceedings, the 1970 Act is predominantly an exercise of the bankruptcy power of the Congress. Exchange National Bank of Chicago v. Wyatt, 517 F.2d 453, 459-460 (2d Cir. 1975). The *Wyatt* case holds that appeals to the Court of Appeals are governed by section 24a of the Bankruptcy Act, 11 U.S.C. § 47(a). See discussions *infra* at pages 7 *et seq.*, especially 11, n. 24; 18; —; n. 46, ll. 7-12.

commenced the liquidation proceeding, and Eugene L. Bondy, Jr. who was appointed trustee for the liquidation of the Debtor's business.

The Plan was funded entirely by Reading's contributions to the Trust. Neither Reading nor Reading's Employees had any title to the assets of the Trust. Title was in the Trustees who were vested with the sole power to hold, invest and reinvest. The Trustees were empowered to act only upon concurrence of a majority.

Reading's Employees earned benefits based solely on service in Reading's employ.[5] Discharge for certain causes worked a forfeiture of all rights; otherwise, benefits became vested and non-forfeitable over a period of time,[6] and were payable on termination of employment. Payments of benefits to Reading's Employees were to be made by the Trustees upon the written order of the committee responsible under the Plan for its administration.

The Trust's account with the Debtor was opened by the Trustees in December, 1972. The account was held in the following name and style on the Debtor's records: "Trustees For Reading Body Works Profit Sharing Plan Dated April 12, 1957." Control over investment decisions was exercised solely by the Trustees. They communicated regularly with the Debtor with respect to all transactions.

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[5] Each of Reading's Employees was assigned "credit units" on each anniversary date of the Plan. A value was assigned to the "credit units" in the proportion they bore to the total "credit units" of all Reading's Employees, based on the value of the assets in the Trust.

[6] Increasing percentages of an employee's total "credit units" vested over a period of ten years.

On the "filing date"[7] of this liquidation proceeding the books and records of the Debtor reflected a cash credit balance in the account of $133,051.15 for which the Trustees filed a claim. It does not appear from the record what percentage of total Trust assets was involved in this account.

REASONS FOR DENYING THE WRIT

I.

THE PETITIONERS HAVE FAILED TO DEMONSTRATE THAT THE QUESTIONS PRESENTED ARE "CERTWORTHY" WITHIN THE MEANING OF THIS COURT'S RULE 19 AND THE CRITERIA ESTABLISHED BY ITS DECISIONS, PARTICULARLY IN LIGHT OF THE INTERLOCUTORY NATURE OF THE JUDGMENT OF THE COURT OF APPEALS.

The judgment of the Court of Appeals is interlocutory.[8] Although the petition may be denied for that reason alone, at the very least the Petitioners' burden is more onerous than in cases involving a final

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[7] The "filing date", as defined in section 78eee(b)(4)(B), is the date as of which the securities and cash claims of customers are valued under section 78fff(c)(2)(A)(iv).

[8] Under the interpretation of the 1970 Act adopted by the Court of Appeals, whether and to what extent the claim of the Trust is for securities or cash is now a viable question materially affecting the amount of recovery (see page 14, *infra*). Hence the Court remanded the case for resolution of the remaining factual and legal issues. In contrast, those issues were mooted by the District Court's interpretation which would have afforded complete satisfaction of the Trust's claim irrespective of whether it is, in whole or part, a claim for securities. The Petition attempts to avoid the interlocutory character of the Court of Appeals' judgment by the unavailing comment that the issues of law and fact which were remanded have "nothing to do with the finality of the issue here involved." (Petition at 5) This observation confuses the principles of finality of judgment with the doctrine of "law of the case". See Hamilton-Brown Shoe Co. v. Wolf Brothers & Co., 240 U.S. 251, 258 (1916).

judgment. *Brotherhood of Locomotive Firemen v. Bangor & Aroostook, R.R.*, 389 U.S. 327 (1967); *Hamilton-Brown Shoe Co. v. Wolf Brothers & Co.*, 240 U.S. 251, 258 (1916); *Mitchell Store Building Co. v. Carroll*, 232 U.S. 379 (1914) (bankruptcy); *American Construction Co. v. Jacksonville, T. & K. W. Ry.*, 148 U.S. 372, 384 (1893); R. STERN & E. GRESSMAN, SUPREME COURT PRACTICE § 4.19, at 180 (4th ed. 1969).

The Petitioners fail to demonstrate unusual circumstances sufficient to warrant review by this Court. The decision of the Court of Appeals is not in conflict with the decision of any other court. Indeed, it is so clearly the ineluctable result of sound analysis that it will undoubtedly command the respect of courts in other Circuits should the issue again arise. The Court of Appeals below has had extensive experience with the 1970 Act.[9] Although the questions presented are relatively important in the sense that most federal questions are important, there is no need that they be settled by this Court at this time.

Shorn of its curious rhetoric concerning an alleged conflict between the 1970 Act and other unrelated federal statutes,[10] the Petition is essentially a naked claim of error and a plea for judicial legislation.

[9] See Exchange National Bank of Chicago v. Wyatt, 517 F.2d 453 (2d Cir. 1975); SIPC v. Charisma Securities Corp., 506 F.2d 1191 (2d Cir. 1974); SEC v. Packer, Wilbur & Co., Inc., 498 F.2d 978 (2d Cir. 1974); SEC v. F. O. Baroff Co., Inc., 497 F.2d 280 (2d Cir. 1974); SEC v. Oxford Securities, Ltd., 486 F.2d 1396 (2d Cir. 1973); SEC v. Alan F. Hughes, Inc., 481 F.2d 401 (2d Cir.), *cert. denied*, 414 U.S. 1092 (1973); SEC v. Alan F. Hughes, Inc., 461 F.2d 974 (2d Cir. 1972).

[10] The Petition refers to the Employee Retirement Income Security Act, the Federal Deposit Insurance Act, and the Federal Savings and Loan Insurance Act.

Bereft of meaningful analysis of the provisions and legislative history of the 1970 Act or the antecedent provisions of section 60e of the Bankruptcy Act, the Petition merely urges this court to *imply* a remedy in order to produce the result it seeks (Petition at 10-15). This is hardly a case involving the doctrine of implied rights of action enunciated in the cases cited by Petitioners.[11] The 1970 Act meticulously provides for the rights of customers. The question is merely one of statutory construction, and the Petitioners have failed to show that the rationale and analysis of the Court of Appeals is anything but a cogent and irrefutable application of the 1970 Act as it was written and intended.

II.

THE COURT OF APPEALS WAS CLEARLY CORRECT IN DECIDING THAT THE TRUST, ON BEHALF OF WHICH THE TRUSTEES MAINTAINED A SINGLE ACCOUNT WITH THE DEBTOR, WAS THE "CUSTOMER" OF THE DEBTOR WITHIN THE MEANING AND INTENT OF THE 1970 ACT.

A liquidation proceeding under the 1970 Act is a practical equivalent to a stockbroker bankruptcy conducted in accordance with section 60e of the Bankruptcy Act, with the added feature of SIPC's funds as a supplemental source for the satisfaction of customers' claims against a debtor's estate (discussed *infra* at 14). Each customer (as defined) with a claim for the net equity of his account or accounts is entitled to a maximum of $50,000 protection from SIPC's funds.[12] The definitions of customer

[11] Petitioners cite Cort v. Ash, 422 U.S. 66 (1975); SIPC v. Barbour, 421 U.S. 412 (1975); and National Rail Passenger Corp. v. National Association of Rail Passengers, 414 U.S. 453 (1974).

[12] Section 78fff(f).

and net equity are not the unique contrivances of the 1970 Act. They are derived (*in haec verba* for purposes of this issue) from section 60e of the Bankruptcy Act (discussed *infra* at 11-13).[13] Hence a brief analysis of section 60e and its genesis is essential.

History And Effect Of Section 60e Of The Bankruptcy Act

Prior to section 60e the common law of the several states largely determined the rights of margin and cash customers in stockbroker bankruptcy proceedings. Both were relegated to the status of general creditors if they could not trace their securities under contemporary tracing doctrines.[14] In the final analysis, various principles made the rights of margin and cash customers depend largely upon fortuitous circumstances affecting their ability to trace and reclaim their securities.[15] The law came under heavy criticism which led to the enactment of section 60e as part of the Chandler Act.[16]

[13] See note 28, *infra;* see also SEC v. F. O. Baroff Co., Inc., 497 F.2d 280 (2d Cir. 1974); SEC v. Aberdeen Securities Co., Inc., 480 F.2d 1121 (3d Cir.), *cert. denied,* 414 U.S. 1111 (1973).

[14] An excellent discussion may be found in Smith, *Margin Stocks,* 35 HARV. L. REV. 485 (1922).

[15] A very helpful summary may be found in In re J. C. Wilson & Co., 252 Fed. 631 (S.D.N.Y. 1917).

[16] Hagar, *The Bankruptcy Law as Applied To Stockbrokerage Transactions,* 30 *Yale L. J.* 488 (1921); Note, *The Rights of a Customer in Collateral Security Given a Stockbroker,* 22 COL. L. REV. 155 (1922); Oppenheimer, *Rights and Obligations of Customers in Stockbrokerage Bankruptcies,* 37 HARV. L. REV. 860 (1924); McLaughlin, *Amendment of the Bankruptcy Act,* 40 HARV. L. REV. 341, 383-385 (1927); Holohan, *Contribution Among Securities Pledged by a Defaulting Stock Broker,* 4 SO. CAL. L. REV. 1 (1930); McLaughlin, *Aspects of the Chandler Bill to Amend the Bankruptcy Act,* 4 U. CHI. L. REV. 369 (1937).

Section 60e was intended to overcome the existing inequities which the law had visited upon conventional margin and cash customers. There was no intention, or need, to define "customers" in a unique or unorthodox manner. This is clear from the legislative history,[17] and has consistently been so understood by commentators[18] the SEC[19] and the courts.[20] Section 60e was intended for the benefit of margin and cash customers, as a class, who entrusted their securities to

[17] H.R. Rep. No. 1409, 75th Cong., 1st Sess. 31 (1937); House Hearings on H.R. 6439, 8046 Before the House Comm. on the Judiciary, 75th Cong., 1st Sess. 125-131 (1937); Analysis of H.R. 12889, 74th Cong., 2d Sess. 192-93 (Comm. Print 1936).

[18] Weinstein, *The Bankruptcy Law of 1938,* 122 *et seq,* (1939) (hereinafter "Weinstein"); Gilchrist, *Stockbrokers' Bankruptcies: Problems Created by the Chandler Act,* 24 MINN. L. REV. 52 (1939); Comment, *The Bankrupt Stockbroker: Section 60e of the Chandler Act,* 39 COL. L. REV. 485 (1939). One commentator who was involved in the legislative process observed: "This new subdivision is intended to make the law uniform and to avoid inequities in distribution. Upon the bankruptcy of a stockholder, all margin and cash customers are treated as a single class and the securities and proceeds on hand for the purchase or from the sale of the securities of such customers are set up into a single and separate fund, to be distributed, except as otherwise provided in this subdivision, pro rata among such margin and cash customers, according to their respective net equities in their trading accounts." Weinstein, *supra* at 122.

[19] Report of Special Study of Securities Markets of the Securities and Exchange Commission, H. R. Doc. No. 95, Pt. 1, 88th Cong., 1st Sess. at 410 *et seq.*

[20] See, *e.g.,* Tepper v. Chichester, 285 F.2d 309 (9th Cir. 1960); Gordon v. Spalding, 268 F.2d 327 (5th Cir. 1959); In re McMillan, Rapp & Co., 123 F.2d 428 (3d Cir. 1941); SEC v. First Securities Co. of Chicago, 366 F. Supp. 367 (N.D. Ill. 1973), *rev'd on other grounds,* 507 F.2d 417 (7th Cir. 1974).

their broker.[21] It contemplated transactions "in the form usual to dealings" between the customer and his broker and related only to securities held for the customer's account.[22]

Section 60e permitted limited tracing by customers. Thus, "cash customers" (as defined) were entitled to reclaim fully-paid securities which were their "specifically identifiable property" (as defined). To adjust the previous inequities, all other property (as defined) held by the stockbroker for customers was classified as a "single and separate fund" (as defined) for the benefit of all customers as a "single and separate class of creditors" (as defined). Each customer was entitled to his pro rata share of that fund based on the "net equity" (as defined) of his account. The terms customer and cash customer were defined in a manner consistent with common industry usage. The definition of customer was merely "designed to cover every form of transaction dealt with" under section 60e[23]—the customary activities in a typical securities account.

The 1970 Act

The background and general purposes of the 1970 Act are familiar to this Court. *SIPC v. Barbour,* 421 U.S. 412 (1975). Discussion will be confined to those provisions relevant to the questions presented.

[21] See *e.g.*, SEC v. First Securities Co. of Chicago, 507 F.2d 417, 420-22 (7th Cir. 1974); In re Barraco and Co., 478 F.2d 517, 520 (10th Cir. 1973); Mardick v. Stover, 392 F.2d 561, 564 (9th Cir. 1968); Bush v. Masiello, 55 F.R.D. 72, 75 (S.D.N.Y. 1972).

[22] Cases cited note 20 *supra*, especially SEC v. First Securities Co. of Chicago, 507 F.2d at 421.

[23] Weinstein, *supra*, n. 18 at 123.

As noted above, a liquidation proceeding is essentially a section 60e bankruptcy[24] in which the debtor's assets are augmented by SIPC's funds within the limits of the statute. The decision to accomplish the broad objective of the 1970 Act by means of that vehicle was made after earlier approaches derived from the Federal Deposit Insurance Act were rejected as ill-suited to the securities industry.[25] As the cited portions of legislative history show, rejection of an FDIA approach largely resulted from the judgment and exhortation of both the SEC and the securities industry.[26]

Section 35(m)(10)(A) of the first bill jointly drafted by the SEC and the industry incorporated the section 60e definitions ("customer", "net equity" etc.) by reference.[27] With some minor modifications not here relevant (discussed *infra* at 12-13), the 1970 Act actually restated those definitions *in haec verba*. Congress explicitly stated its intention not to vary the meaning of the section 60e definitions. Thus, both the Senate and House Reports state:

> "In addition, the bill uses certain terms defined in section 60e *with the meanings there established,*

[24] See, *e.g.*, Exchange National Bank of Chicago v. Wyatt, *supra*, n. 9; SEC v. Aberdeen Securities Co., Inc., *supra*, n. 13.

[25] Hearings on S. 2348, S. 2988, S.2989 Before the Subcommittee on Securities of the Senate Committee on Banking and Currency, 91st Cong., 2d Sess. 29, 175-77, 185, 191, 210-212, 255-257, 267-268 (1970) (hereinafter "Senate Hearings"); Hearings on H.R. 13308, H.R. 17585, H.R. 18081, H.R. 18109, H.R. 18458 Before the Subcommittee on Commerce and Finance of the House Comm. on Interstate and Foreign Commerce, 91st Cong., 2d Sess. 221-222 (1970) (hereinafter "House Hearings").

[26] One prominent industry representative observed: "Models chosen from one field of activity rarely fit exactly the needs of another field. I do not think the pattern of the FDIC fits the securities industry very well." Senate Hearings at 29.

[27] Senate Hearings at 261; House Hearings at 324.

except as further defined in the bill". (emphasis added)[28]

It has been aptly stated that the 1970 Act was an "... engraftment of insurance provisions upon the preexisting Section 60(e) bankruptcy provisions applicable to stockbrokers, 11 U.S.C. § 96(e)."[29] Because sections 78fff(c)(2)(A)-(D) cover the definitions and other matters included in section 60e, section 78fff excludes section 60e from the operation of its terms which incorporate many provisions of the Bankruptcy Act.

In consequence of the foregoing, the rights of customers in a 1970 Act liquidation are tied to the section 60e concepts of customer, cash customer, specifically identifiable property, net equity and single and separate fund—"with the meanings there established." The definition of customers[30] conforms exactly to the definition in section 60e except for three changes not relevant here.[31] The definition of net

[28] S. Rep. No. 91-1218, 91st Cong., 2d Sess. 10 (1970) (hereinafter "Senate Report"); H.R. Rep. No. 91-1613, 91st Cong., 2d Sess. 9 (1970) (hereinafter "House Report"); See also Senate Report at 13 and House Report at 10, 20.

[29] SEC v. Aberdeen Securities Co., Inc., *supra* n. 13 at 1123.

[30] Section 78fff(c)(2)(A)(ii).

[31] *First,* it includes persons with transactions as to which the debtor acted as principal (dealer), thereby correcting an ambiguity in section 60e which led to the exclusion of such a person in Gordon v. Spalding, 268 F.2d 327 (5th Cir. 1959). See Senate Hearings at 261. *Second,* it now specifically includes persons who had deposited cash for the purpose of purchasing securities, thereby resolving another ambiguity under section 60e. See Report of Special Study of Securities Markets of the Securities and Exchange Commission, H.R. Doc. No. 95, Pt. 1, 88th Cong., 1st Sess. 416 (1963). *Third,* the definition now specifically excludes persons to the extent their claims relate to capital contributions or subordinated loans to the debtor.

equity[32] was likewise taken *in haec verba* from section 60e except for three changes, of which two are as follows.[33] While section 60e referred only to the "account" of a customer, the 1970 Act definition refers to the "account or accounts" of a customer. This was designed to limit the maximum protection to $50,000 per customer.[34] Correspondingly, language was added to assure separate protection to the same person acting "in separate capacities" with respect to different accounts. There is nothing whatever in the "customer" or "net equity" definitions in the 1970 Act to suggest that Congress meant to define customers so as to include persons other than the conventional cash or margin customers contemplated by section 60e.

Just as under section 60e, under section 78fff(c)(2)(B) customers are a single and separate preferred class of creditors who share pro rata in the single and separate fund, and then *pari passu* with general cred-

[32] Section 78fff(c)(2)(A)(iv).

[33] The third gives effect to open contractual commitments completed as provided in section 78fff(d). That section authorizes the trustee to complete interbroker transactions with the use of SIPC's funds if necessary. This authority was designed to avoid the so-called "domino effect," namely, the chance that the debtor's demise might precipitate the failure of one or more other broker-dealers. House Report at 9; Senate Report at 4, 11; Senate Hearings at 147. See also SEC v. Packer, Wilbur & Co., Inc., *supra* n. 9. SEC v. Aberdeen Securities Co., Inc., *supra* note 13. Such transactions may involve a customer's account and must therefore be considered in calculating his "net equity". That was unnecessary under section 60e because the completion of such open transactions was not authorized.

[34] The $50,000 protection afforded by section 78fff(f)(1) is based on a customer's "net equity". Without this change in the "net equity" definition, each customer might have been deemed protected to $50,000 for each of his accounts.

itors in the general estate. However, under section 78fff(f)(1) SIPC's funds are now available to cover deficiencies in the debtor's estate within prescribed limits (discussed below). Contrary to the Petitioners' suggestion (Petition at 9) the availability of those funds has no legitimate interpretive impact on the definitions of customer, net equity and other terms which establish the substantive rights of persons. It simply shores up the estate so that customers are no longer entirely dependent for their recoveries upon the debtor's assets.

Under section 78fff(f)(1) SIPC may advance a maximum of $50,000 to satisfy the net equity of each customer. Of that, only $20,000 may be advanced for that portion of the net equity which is based on a cash credit balance with the debtor, as distinct from securities positions. To the extent SIPC makes such advances it is subrogated to the rights of customers against the debtor's estate. The Petitioners' numerous references to conventional insurance are inappropriate.

It is impossible to read the definition of customer as would the Petitioners without doing violence to considerable statutory language. The definition itself refers to "persons *with whom the debtor deals*" (emphasis added) and to persons with "claims" (creditors of the debtor) on account of various specified transactions with the debtor which the Reading Employees never had, and could not have, with respect to the Trust's account. The net equity definition provides for subtraction of "the indebtedness, if any, of the customer to the debtor from the sum which would have been owing by the debtor to the customer". The notion of a conventional customer pervades section

78fff. For example, "customers" are persons to whom the trustee in liquidation is authorized to deliver securities held in their accounts [subd. (c)(2)(B)]; the trustee must give notice of the proceeding to "customers of the debtor as their addresses shall appear from the debtor's books and records" [subd. (e)]; and he must make payments or deliveries of securities directly to the debtor's customers [subd. (g)]. These and other provisions of section 78fff are as obvious as section 60e in their contemplation of the conventional securities customer.

When Congress meant to provide protection based on persons more remote than a debtor's actual customers it did so unequivocally. Thus, although customers who are broker-dealers or banks are denied protection from SIPC's funds, section 78fff(f)(1)(D) specifically authorizes up to $50,000 protection for each of *their* customers on whose behalf they had transactions with the debtor. Each such person is "deemed a separate customer of the debtor". Congress made no similar provision in the case of fiduciary accounts. This was not mere oversight. The 1970 Act recognized that fiduciary accounts are a part of the business of broker-dealers. Thus it provided that a customer who maintains multiple accounts "in separate capacities" shall be deemed a "different customer" in each capacity, and it authorized protection from SIPC's funds up to $50,000 for each capacity.[35] It clearly tied protection to the fiduciary himself, not to the number of his *cestui que trustent*.

The legislative history provides further conclusive evidence of the error of Petitioners' position. Several

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[35] Sections 78fff(c)(2)(A)(iv) and 78fff(f)(1)(B).

bills preceded the one eventually enacted as the 1970 Act. The four earliest bills were substantially modeled after the FDIA.[36] One of them would have expanded protection beyond $50,000 (up to $250,000) based on "the beneficial interest of five or more natural persons".[37] Two others would have provided $50,000 for each person on whose behalf a customer was "acting as agent".[38] These departures from the concept of limited protection per conventional customer were plainly rejected by subsequent bills[39] and, eventually, the 1970 Act. The legislative history clearly shows that the conventional securities customer was all that anyone had in mind in the class to be protected. During the hearings the terms "customer", "account" and "investor" were used interchangeably by securi-

[36] S. 2348, and as amended, H.R. 13308, H.R. 17585.

[37] "(5) The term 'insured customer account' means (a) the net amount due any customer from his account maintained with an insured broker or insured dealer, less any part thereof which is in excess of $50,000 or such larger amount as shall be determined by rule or regulation of the Corporation; or (b) the net amount due any institution or entity which represents the beneficial interest of five or more natural persons, less any part thereof which is in excess of $250,000 or such larger amount as shall be determined by rule or regulation of the Corporation". S. 2348, as amended April 9, 1970.

[38] ". . . in the case of a person acting as agent who transacts business for third parties through an account or accounts with a broker, dealer, or member of a national securities exchange, for purposes of the $50,000 limitation, the term customer shall not be limited by the number of such accounts but shall include each such third party insofar as the claims of such third parties are ascertainable from the books and records of either the debtor or the person acting as agent made available to the trustee or are otherwise determined to the satisfaction of the trustee." S. 3988; S. 3989.

[39] H.R. 18458; H.R. 19333; S. 2348 as reported out.

ties industry representatives,[40] members of Congress,[41] the SEC[42] and other representatives of the federal government.[43] The testimony of the then Chairman of the SEC underscores that this legislation was intended to provide $50,000 protection for each securities customer in the ordinary industry sense.[44]

The Petition Before This Court

The Petition is replete with misconceptions of law and unwarranted factual assertions. For example it states (page 13) that Congress gave "little attention" to the definition of customers; states (page 8) that the definition of customer is surrounded by ambiguity; states (page 7) that certain persons associated with the debtor are excluded from the definition of customers;[45]

[40] Senate Hearings at 11-12, 26-27, 36, 40, 42-45, 178-179, 187, 206, 208-209, 219-220, 225, 227; House Hearings at 166, 306-310, 352-354. A prominent representative of the securities industry referred to risks ". . . run by the investor who may have just walked off Main Street . . . ." Senate Hearings at 42.

[41] Senate Hearings at 142-144, 252-253; House Hearings at 233, 373-374; see also Senate Report at 1-4, 11-14; House Report at 1-4, 8-10. To illustrate, one member of Congress spoke of ". . . the average person picking up the phone, calling his broker . . . ." House Hearings at 233.

[42] Senate Hearings at 8-10, 16, 257; House Hearings at 149-154, 226-228, 230, 328, 333-334, 367-368, 370.

[43] Senate Hearings at 245-246. See also Senate Report at 1-4, 11-14; House Report at 1-4, 8-10; H.R. Rep. No. 91-1788 (Conference Report) 91st Cong., 2d Sess. 1, 24, 26 (1970).

[44] House Hearings at 339-340. See also Senate Hearings at 257; House Hearings at 376, 379-380.

[45] Section 78fff(f)(1)(C) excludes certain associated persons from protection from SIPC's funds, but does not affect the rights of those persons to share in the single and separate fund or the general estate.

suggests (page 9) that a customer's net equity is not the basis of protection from SIPC's funds; and repeatedly embroiders the facts by referring to the Debtor as the Reading Employees' broker (pages 6, 11), to the Trust account as their account (pages 3, 6), and to their alleged "ownership interest" in the securities or cash in the Trust Account (page 6) which they allegedly had a right to claim (pages 11, 12). Other errors appear,[46] the aggregate of which may have contributed to the Petitioners' ultimate misunderstanding of the term customer as defined in the 1970 Act.

Insofar as the Petitioners contend that each Reading Employee was the separate customer of the

[46] *First,* the Petition cites (page 8, n. 14) a case as construing the 1970 Act when in fact it construed the definition of customer in section 60e of the Bankruptcy Act. See SEC v. First Securities Co. of Chicago, 507 F.2d 417, 421-22 (7th Cir. 1974). *Second,* it states (page 7) that no case has construed the definition of customer in section 60e when, in fact, the *First Securities* case, *supra,* and others, did. *Supra* n. 21. *Third,* it erroneously suggests that a 1970 Act proceeding is not a true bankruptcy, specifically stating that the debtor's obligations are not dischargeable. The law is otherwise. See section 78fff(c)(1) and discussion at pages 3, n. 4 and 11-13, *supra;* Exchange National Bank of Chicago v. Wyatt, 517 F.2d 453 (2d Cir. 1975); *SEC* v. *Wick,* 360 F. Supp. 312 (N.D. Ill. 1973). *Fourth,* it incorrectly states (pages 8, 14-15) that the issue here is the same as that presented in *In re Weis Securities Inc.* (Claim of McGrath), which involved the interpretation and application of section 78fff(f)(1)(C) which prohibits the use of SIPC's funds, "directly or indirectly", for the benefit of certain persons associated with the debtor. *Fifth,* it erroneously states (page 15) that the 1970 Act is an amendment to the Securities Exchange Act of 1934 ("1934 Act"). Section 78bbb merely makes the provisions of the 1934 Act generally applicable. Compare with section 78ggg(d) which did amend the 1934 Act, and earlier versions of this legislation which would have made the 1970 Act an amendment to the 1934 Act. H.R. 18109, 91st Cong., 2d Sess. §§ 2, 3, 4 (1970); H.R. 18081, 91st Cong., 2d Sess. § 2 (1970); H.R. 18458, 91st Cong., 2d Sess. § 2 (1970).

Debtor, further discussion is unnecessary. The 1970 Act simply was not intended to work a profound metamorphosis whereby these non-customer trust beneficiaries were transmuted into customers of the Debtor.

The Petitioners' alternative position is equally devoid of merit. Although they correctly observe (Petition at 12) that they effected transactions with the Debtor and were the investors or traders, it hardly follows that each was a separate customer of the Debtor within the meaning of the 1970 Act. Only brief discussion is necessary.

By their terms the Plan and the Trust involved here are governed by the laws of Pennsylvania.[47] It is the settled law of Pennsylvania and other jurisdictions that co-trustees constitute but one "collective trustee", that they act in a single joint capacity, and that their powers, interests and authority in the subject matter of the trust are equal and undivided.[48] Plainly the Trustees here maintained a single trust account in a single collective capacity. No one of them had a separate capacity or could be deemed a "separate customer" under section 78fff(c)(2)(A)(iv) or section 78fff(f)(1)(B) of the 1970 Act (discussed *supra* at 13, 15). Together they managed a single trust account which had a single net equity protected to

[47] Paragraph 12.1 of the Plan provides: "The plan and the trust agreement shall be construed according to the laws of the state of Pennsylvania." Paragraph 8.5 of the Trust agreement similarly provides.

[48] See, *e.g.,* Diviney v. Lynch, 372 Pa. 570 (1953); In re Dorrance's Will, 333 Pa. 162, 166 (1939); Coxe v. Kriebel, 323 Pa. 157, 166-167 (1936); Appeal of Vandever, 8 Watts & S. 405, 405 (Pa. 1845); Hanson v. Birmingham, 92 F.Supp. 33, 42 (N.D. Iowa 1950); Kane v. Lewis, 282 App. Div. 529, 530 (3d Dep't 1953).

$50,000 maximum under section 78fff(f)(1). No amount of legerdemain could support the idea that the amount of protection accorded trust accounts by Congress depends upon such a capricious basis as the number of trustees. The Court of Appeals properly so held.

The Petitioners' pecuniary interest in expanding the definition of customers beyond its terms and intended scope overlooks, among other things, the fact that the 1970 Act was intended only to supply *limited* protection to customers.[49] During the legislative hearings it was recognized that the $50,000 limitation would not fully protect customers with very substantial accounts.[50] The limited protection, in conjunction with other provisions of the 1970 Act, was designed to "restore investor confidence in the capital markets." [51] There was no intention fully to protect against all losses attendant upon the financial collapse of broker-dealers. The decision of the Court of Appeals affords this Trust the full measure of the limited protection intended by Congress. Adoption of either of the Petitioners' contentions by the Court of Appeals would have been judicial legislation tending greatly to enlarge the exposure of SIPC's funds (modest when compared to the FDIC),[52] with potential impact upon

[49] See, *e.g.* SEC v. Packer, Wilbur & Co., Inc., 498 F.2d 978, 983 (2d Cir. 1974).

[50] See, *e.g.*, House Hearings at 339-340.

[51] SIPC v. Barbour, 421 U.S. 412, 415 (1975).

[52] At December 31, 1975 the SIPC Fund [as defined in section 78ddd(a) *et seq.*] totalled $87,562,946. 5 SIPC ANN. REP. 19 (1975). The minimum congressional objective was to build the Fund to 150 million dollars, after which assessments on SIPC's broker-dealer members may be reduced. See section 78ddd(d)(1). It was thought that objective would be achieved in five years. Senate Hearings at 243; House Hearings at 346. It has not.

funds of the United States and a resulting increased burden on the securities industry as well as investors in equity securities.[53]

CONCLUSION

Respondent Securities Investor Protection Corporation respectfully submits that the petition for a writ of certiorari should be denied.

Respectfully submitted,

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[53] If SIPC's funds should become insufficient to meet the purposes of the 1970 Act, up to 1 billion dollars may be borrowed by SIPC from the United States Treasury. Section 78ddd(g)-(h). These funds must be repaid. *Ibid*; see also section 78ddd(f). Such repayment may involve both an increase in the assessments on SIPC's broker-dealer members [section 78ddd(d)(1), (f) and (g)], and the imposition of a transaction fee upon certain purchasers of equity securities. Section 78ddd(g). During the congressional hearings, the then Under Secretary for Monetary Affairs expressed concern regarding a possible drain on funds of the United States. See Senate Hearings at 242-244; House Hearings at 344-347. It was hoped that the SIPC Fund derived from assessments on broker-dealers would be sufficient and "self-sustaining" to carry out the purposes of The 1970 Act. *Ibid.* The Secretary of the Treasury and the Federal Reserve Board are both represented on SIPC's Board of Directors. Section 78ccc(c)(2)(A) & (B).